DEPUTY PUBLIC PROSECUTOR v. TAN AH GUAT.

[App. Crim. Juris. (Brown, J.) January 17, 1947]

Liquors Revenue Ordinance, Sections 28 (1), 77 and 83—Possession of dutiable liquor—Forfeiture of Vehicle used for conveyance of the liquor—Evidence that vehicle has been seized is necessary—Definition of "intoxicating liquor" in Section 2 of Liquors Revenue Ordinance as amended by the Liquors Revenue (Amendment) Ordinance 1941—Certificate of Government Analyst under Section 427 of the Criminal Procedure Code—Departmental Titles (Alteration) Ordinance, 1937.

This was an appeal by the Deputy Public Prosecutor against the order of the learned Magistrate that a taxi in which alleged dutiable liquor had been found, should be restored to the respondent, who was the driver of the taxi. On the hearing of the appeal, it was contended for the respondent (1) that the record failed to disclose that the car had been detained or seized and (2) that the certificate of the analyst was defective.

Held, (1) the certificate from the "chemist" which was put in evidence in this case was inadmissible in evidence, as he was not a person whose certificate was admissible under Section 427 of the Criminal Procedure Code (as modified by the Departmental Titles (Alteration) Ordinance, 1947);

(2) that the certificate did not show that the alleged samsu was fit or intended for use as a beverage, which is one of the ingredients of the definition of "intoxicating liquor" in the Ordinance and there was therefore no proof that the alleged samsu was "intoxicating liquor";

(3) that before an order for forfeiture of a vehicle can be made under Section 83 of the Liquors Revenue Ordinance, it must be shown (a) that an offence has been committed and (b) that the vehicle has been detained and as in this case no offence has been proved to be committed and there was no express evidence that the vehicle had been seized, no order of forfeiture could be made.

MAGISTRATE'S APPEAL.

A. W. Bellamy for the Appellant.

D. K. Walters (Wee Chong Jin with him) for the Respondent.

Brown, J. in an oral judgment said :—This is an appeal by the D.P.P. against the order of the learned Magistrate that the taxi should be restored to the respondent.

It is a pre-requisite to an order for forfeiture being made under section 83 of the Liquors Revenue Ordinance that :—

(a) An offence should have been committed.

(b) That the vehicle should have been detained.

In this case the prosecution failed to prove that an offence had been committed. A certificate was put in evidence under section 427 of the Criminal Procedure Code from somebody describing him as Chemist, and he is not a person whose certificate is admissible under that section. But what was fatal to the prosecution case was that the certificate (even if it had been admissible) failed to prove that the alleged samsu was "intoxicating liquor" under the definition contained in the Ordinance. There are two ingredients of that definition :—

(a) That it contained more than 2% alcohol by weight;

(b) That it is fit (or intended) for use as a beverage.

The first was proved. The second was not. And I would observe that it is highly desirable (even though not strictly necessary) that the wording of the definition should be followed in the certificate.

Therefore I find that no offence was proved to have been committed. Further, there is no evidence (as there ought to have been) that the vehicle had been seized, and before an order for forfeiture can be made there must in my opinion be express evidence to this effect.

As No. 1 Accused pleaded guilty, and this case has been brought to my notice in which I find that the prosecution did not prove their case, I order that the conviction and sentence of No. 1 Accused be set aside, and if any part of the fine has been paid it must be refunded.

The appeal is dismissed.

Appeal Dismissed.

MALAYAN UNION REPORTS.

LYE FOOK SEN vs. PUBLIC PROSECUTOR

[App. Crim. Juris. (Carey, Ag. C.J., Malayan Union, Jobling and Brown, JJ., Singapore, December 13, 1946]

Public Order and Safety Proclamation, Section 3 (1)—Assessment of Sentence—Principles on which Court of Appeal will act in reviewing sentences thereunder.

The appellant had been found guilty by the assessors of carrying arms contrary to Section 3 (1) of the Public Order and Safety Proclamation and had been sentenced to death. The learned trial Judge stated that he was satisfied on the evidence that the appellant used the firearm, by firing at a soldier whom he believed to be attempting to apprehend him.

Held, that, in this case, there was abundant evidence to show that the appellant had fired the revolver he carried in an effort to evade arrest and that there was therefore no legal justification for interfering with the sentence.

Case referred to :—

(1) *Choh Wai Sung v. Public Prosecutor* (1946) 12 M.L.J. 119.

APPEAL TO COURT OF APPEAL.

The judgment of the Court of Appeal was delivered by :—

Carey, Ag. C.J. :—This is an appeal against sentence of death imposed in respect of the carrying of arms contrary to section 3 (1) of the Public Order and Safety Proclamation.

The appellant was found guilty by the assessors of carrying arms and thereafter the learned trial Judge, as he has stated, being satisfied on the evidence that the appellant used the firearm, by firing at a soldier whom he believed to be attempting to apprehend him, passed sentence of death, having in mind the guiding principles laid down in the case of *Choh Wai Sung v. Public Prosecutor*[1].

We desire to point out that the dictum of this Court in that case should be interpreted as laying down the principles on which this Court will act in reviewing sentences under section 3 (1) of the Public Order and Safety Proclamation, and not, of course, as restricting the discretion of the trial Judge as to the proper sentence to be imposed in any case. We feel obliged at the same time to state that in our opinion the law as it stands at present throws an exceptional and undesirable responsibility on a trial Judge in regard to sentence in that after the jury or assessors, as the case may be, have found that the accused was carrying arms contrary to the Proclamation, the Judge must then, to conform with the principles of sentencing laid down by the judgment of this Court in *Choh Wai Sung v. P. P.*, himself find whether or not the arms were actually used.

As the accused's life may depend on this finding it is, in our opinion, highly desirable that it should be placed within the province of the jury and that the law should be amended to effect this.

In the present case there is abundant evidence to support the verdict and the fact that the appellant fired the revolver he carried in an effort to evade arrest.

In these circumstances we can see no legal justification for interfering with the sentence.

The appeal is dismissed.

Appeal Dismissed.

E. A. S. WAGNER AND ANOTHER v. TAN ENG YEOW.

[App. Civil Juris. (Willan, C.J.) November 25, 1946]

Landlord and Tenant—Rent and Charged Land (Restriction) Enactment No. 14 of 1940, Section 7—Rent more than 14 days in arrears at date of issue of Notice to Quit—Rent subsequently paid up to date of expiration of notice—Whether acceptance of rent acts as waiver of right to proceed with ejectment proceedings without the permission of the Rent Assessment Board.

The plaintiffs are the trustees of the estate of Christian Wagner (deceased) and the defendant was the tenant of premises No. 32 Tamby Abdullah Road, Kuala Lumpur, which belongs to that estate. The defendant fell into arrears of rent from 15th March 1946 and on the 10th July 1946 the first plaintiff caused a notice to quit to be served on the defendant which expired on the 14th day of August 1946. On the 9th day of August 1946, the defendant paid the arrears of rent due in respect of the said premises from the 15th day of March 1946 up to the 14th day of August 1946, being the date of expiration of such notice, but no rent was paid or received beyond that date. On the 17th day of August 1946 the first plaintiff filed a plaint in the District Court, Kuala Lumpur, claiming an order for the ejectment of the defendant from the said premises and also double rent for "holding over" from the 14th day of August 1946 to the date of delivery of vacant possession. The District Judge dismissed the suit with costs without calling evidence on the grounds (1) that at the time of the presentation of the plaint the defendant was not in arrears with his rent (2) that Section 7 of the Rent and Charged Land (Restriction) Enactment 1940 requires the permission in writing of the Rent Assessment Board to be obtained as a prerequisite to the taking of any step towards the ejection of a tenant by a landlord and (3) that the proviso to Section 7 of the Rent and Charged Land (Restriction) Enactment does not apply and therefore the proceedings were illegal **ab initio**. The plaintiffs appealed against this decision.

Held, (1) that as the defendant had been in arrears with the payment of his rent for more than fourteen days on the day the notice to quit was issued, the plaintiff was entitled to take steps to eject the defendant from the premises without obtaining the permission of the Rent Assessment Board by virtue of the proviso to Section 7 of the Rent and Charged Land (Restriction) Enactment, 1940;

(2) that the plaintiff had not in accepting rent up to, but not beyond, the period of the notice to quit